IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CHARLES E. BOWDEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Charles E. Bowden respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 24, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. An order rendered by the District Court for the Western District of Washington also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 24, 1971. No petition for rehearing was filed. This petition for certiorari was filed

within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the immunity provisions embodied in Title II of the Organized Crime Control Act of 1970, (18 U.S.C. §6001 *et seq.*) are coextensive with the Fifth Amendment privilege against self-incrimination. Stated otherwise, whether a witness can be compelled to testify over the assertion of his Fifth Amendment rights—his only protection being a prohibition against direct or indirect use of his testimony against him in a criminal prosecution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 201(a) of the Organized Crime Control Act of 1970, 84 Stat. 927, 18 U.S.C. 6002 and 6003, provides:

> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> "(1) a court or grand jury of the United States,
>
> "(2) an agency of the United States, or
>
> "(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimi-

nation; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.".

"§6003. Court and grand jury proceedings

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

Section 301(a) of the Organized Crime Control Act of 1970, 84 Stat. 933, 28 U.S.C. 1826, provides:

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon

such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

STATEMENT OF THE CASE

On January 8, 1971, Mr. Charles E. Bowden, the Petitioner, was served with a subpoena *ad testificandum* directing him to appear on January 12, 1971 before a Federal Grand Jury sitting in Seattle, Washington. The Grand Jury was investigating alleged violations of antitrust laws.

Attorneys for the Petitioner filed a motion to quash the subpoena or in the alternative to deny or set aside any court order compelling his testimony which might be requested by the Government pursuant to Title II of the Organized Crime Control Act of 1970 (18 U.S.C §6001 *et seq.*). On January 12, 1971, a hearing on the witness' motion was held before the Honorable William J. Lindberg, United States District Judge. At this proceeding the government requested the court enter an order compelling

the witness to testify pursuant to 18 U.S.C. §6003(b)(2). The hearing was continued until January 13, 1971.

After the proceedings reconvened, the court denied the witness' motion to quash and the Government's request that an order in advance of the witness' appearance before the Grand Jury be issued compelling him to testify. The witness then appeared before the Grand Jury and after answering routine questions such as giving his name and address, refused to answer all other questions on the grounds that the questions violated rights guaranteed to him by the Fifth and Sixth Amendments to the Constitution of the United States. After the witness' appearance before the Grand Jury another hearing was held. The court in substance stated from the bench that the Government's request for an order compelling testimony had been renewed and decided to "reserve ruling until after argument."

Subsequent to the submission of briefs and prior to oral argument, the United States Court of Appeals for the Ninth Circuit rendered an opinion in *Stewart v. United States*, 440 F.2d 954 (1971), *cert. granted, sub. nom. Kastigar v. United States*, 39 U.S. L. WEEK 3511 (U.S. May 17, 1971) (No. 1562), which upheld the constitutionality of the immunity provisions embodied in the Organized Crime Control Act of 1970.[1] In an order dated April 27, 1971, a copy of which is set forth in Appendix C, the District Court per the Honorable George Boldt[2]

1. This Court has agreed to hear two cases arising from State Courts which present substantially the same issue as presented by the case at bar. These two cases are *Sarno v. Illinois*, 39 U.S. L. WEEK 3375 (U.S. March 2, 1971 (No. 565) and *Zicarelli v. New Jersey State Comm'n of Investigation*, 39 U.S. L. WEEK 3375 (U.S. March 2, 1971) (No. 91).

2. During the interim period between the initial hearing and the scheduled date of our argument, the Honorable William J. Lindberg assumed the status of a Senior Judge. The instant matter was transferred to Judge Boldt.

granted the witness immunity pursuant to the provisions of the Crime Control Act and ordered the witness to testify before the Grand Jury. A court order dated April 19, 1971 which granted the Government's application for an immunity order referred to the *Stewart* decision and provided in part:

> "This court deeming itself bound by the decision of the United States Court of Appeals for the Ninth Circuit rules that the immunity provisions of the Organized Crime Control Act are constitutional and accordingly grants the Government's application for an order granting immunity and ordering the witness to testify pursuant to said act."

On April 27, 1971, the petitioner appeared before the Grand Jury. The witness was asked a series of questions, all of which he refused to answer on the basis of the Fifth and Sixth Amendments to the Constitution of the United States. In a hearing, convened in Judge Boldt's chambers, the court ascertained that the witness had refused to testify and held the witness to be in contempt. The court further ruled that the witness would not be placed in confinement in view of the contemplated appeal of the contempt citation.

The decision of the District Court was appealed to the United States Court of Appeals for the Ninth Circuit. On June 24, 1971, the Court of Appeals affirmed the order of the District Court citing its decision in *Stewart v. United States*, *supra*, and *Charleston v. United States*, Civil No. 71-1787, 9th Cir., June 16, 1971.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decision of Another Court of Appeals as to the Constitutionality of the Immunity Provisions of the Organized Crime Control Act of 1970

The United States Court of Appeals for the Seventh Circuit has ruled that the immunity provisions of the Organized Crime Control Act of 1970 are unconstitutional.[3] *In re Korman,* Civil No. 71-1328, 7th Cir., May 20, 1971, *petition for cert. filed* 39 U.S. L. WEEK 2681 (U.S. June 30, 1971) (No. 1848). In that case the court cited *Stewart v. United States, supra,* and expressly recognized that the *Stewart* decision was in conflict with the case there at bar.[4]

Subsequent to *Korman* the Court of Appeals for the Ninth Circuit in *Charleston v. United States, supra,* again sustained the constitutionality of the immunity provisions embodied in the Organized Crime Control Act. In *Charleston* the Court explicitly recognized that the Seventh Circuit in *Korman* had reached a contrary conclusion. The instant Petitioner also cited *Korman* in his brief to the Ninth Circuit. Thus, it is clear that the Court of Appeals for the Ninth Circuit has decided not to reverse the position it took in *Stewart* in order to avoid a conflict between circuits.

These conflicts justify the grant of certiorari to review the judgment below.

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3. The United States District Court for the Southern District of New York has also held these statutes to be unconstitutional. *In re Kinoy,* 326 F. Supp. 407 (S.D.N.Y. 1971).

4. This court recognized the importance of the issue presented in the instant case by granting certiorari in *Stewart.* We respectfully urge that similar action be taken with respect to this petition.

2. The Decision Below Resolved a Federal Question in a Way Which Conflicts with Applicable Decisions of This Court

The basic standards governing the constitutionality of immunity statutes were established by this Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). In *Counselman* this Court stated in part:

> "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. §860 of the Revised Statutes does not supply a complete protection from all of the perils against which the constitutional prohibition was designed to guard, and is not a full substitution for the prohibition. *In view of the constitutional provision, a statutory enactment, to be valid must afford absolute immunity against future prosecution for the offense to which the question relates.*" *Id.* at 585-586. (Emphasis added)

Subsequent to *Counselman*, many decisions of this Court have expressed approval of *Counselman* or the basic principles contained in that decision. *See, Stevens v. Marks*, 383 U.S. 234 (1966); *Albertson v. SACB*, 382 U.S. 70 (1965); *Reina v. United States*, 364 U.S. 507 (1960); *Brown v. United States*, 359 U.S. 41 (1959); *Ullman v United States*, 350 U.S. 422 (1956); *Adams v. Maryland*, 347 U.S. 179 (1954); *Smith v. United States*, 337 U.S. 137 (1949); *United States v. Monia*, 317 U.S. 424 (1943; *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Hale v. Henkel*, 201 U.S. 43 (1906); *Brown v. Walker*, 161 U.S. 591 (1896).

The Court below, basing its rationale on *Murphy v. Waterfront Comm. of New York*, 378 U.S. 52 (1964),

concluded the statements in *Counselman* that an immunity statute must provide absolute immunity from prosecution were no longer viable and need not be followed. *Stewart v. United States, supra,* at 955-957. We believe the reasoning in *Stewart* to be incorrect and have so argued to the courts below. Many of the reasons for this belief are set forth in *In re Korman, supra,* and in *In re Kinoy, supra.*

The judgment below is in conflict with decisions of this Court and we urge that this conflict justifies granting certiorari to review the decision of the Court of Appeals.

3. The Instant Case Presents an Important Question of Constitutional Law Which Should Be Decided By This Court

The instant case presents this Court with an issue involving the character and role which the privilege against self-incrimination is to have in our modern society. In terms of public policy, this question is much the same as the one which confronted the drafters of the Bill of Rights in promulgating the Fifth Amendment. To be determined is whether society's need for information contained in the mind of a potential criminal defendant is so great that it justifies stripping a criminal defendant of his first line of defense, the right to remain silent, while leaving him still subject to future prosecution. Also at issue is whether Americans should have a constitutionally protected right of intellectual privacy. A prosecutor must establish "probable cause" before searching a person's chattels, yet under the position espoused by the Government it would be con-

stitutionally permissible to search a persons' mind with virtual impunity.[5]

Many recent decisions of this Court have dealt with situations in which the accused has made an incriminating statement, e.g., *Miranda v. Arizona,* 384 U.S. 436 (1966). In contrast, this Petitioner has at all times remained silent. Thus, the basic question here to be determined is under what circumstances may a government *lawfully* compel an individual to speak, notwithstanding an assertion of the privilege against self-incrimination. The resolution of this issue will delimit the perimeters of this constitutional right uncomplicated by collateral questions such as waiver of the privilege or the application of an exclusionary rule.

An important related question involves the mode of constitutional analysis employed in deciding this question. Some of the lower courts, when confronted with the issue at bar, have in effect determined that the scope of the privilege is coterminous with the remedy for its violation.[6] Apparently, these courts have been persuaded by analogies to cases which apply "exclusionary rules" to sit-

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5. The requirement that a witness be granted immunity from prosecution (transactional immunity) as a condition for compelling testimony serves to restrain prosecutors from indiscriminate use of their power to compel testimony in abuse of their discretion. Transactional immunity in this regard functions in a manner analogus to the probable cause provision of the Fourth Amendment both which deter prosecutors from going on "fishing expeditions."

6. As a part of its analysis the Court of Appeals relied upon *Wong Sun v. United States,* 371 U.S. 471 (1963), a case which barred the admission of certain "tainted" evidence found to be the product of an unlawful search and seizure. *Stewart v. United States, supra* at 957 n.5. The California Supreme Court in *Byers v. Justice Court,* 458 P.2d 465 (Cal. 1969) *re'vd. sub nom. on other grounds California v. Byers,* 91 S. Ct. 1535 (1971) also relied on cases involving the exclusion of unlawfully obtained evidence to find that the privilege against self-incrimination may be supplanted by a rule which proscribes direct or indirect use of compelled testimony (use immunity).

uations involving unlawful searches and seizures and unlawfully obtained confessions. Such reasoning is not sound and will result in a substantial erosion of the privilege against self-incrimination.

Exclusionary rules are properly applied in "after-the-fact" situations in which there has been a violation of a constitutional right. In such situations, courts are faced with the dilemma of preserving fundamental constitutional guarantees of an accused on one hand, while on the other, assuring that society's interest in bringing criminals to justice is not frustrated. These rules were designed to ameliorate the harm caused by unconstitutional acts, yet enable society to prosecute alleged criminals.

The policies underlining the exclusionary rules are remedial in character, designed to undo harm already done. In the instant case, no harm has been done, since the witness' privilege against self-incrimination remains intact. The policies underlying use immunity—to provide the government with an investigatory tool—are not remedial in character. Therefore, the remedial policies of exclusionary rules are not germane to the issue in the instant case and analogies to exclusionary cases to support the constitutionality of use immunity are logically unsound.

The rationale employed by the lower courts substantially limit the effect of the privilege against self-incrimination by reasoning that the scope of the right is no broader than the remedy for its violation.[7] From this premise,

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7. A determination that an exclusionary rule is an adequate substitute for the privilege against self-incrimination could result in a breakdown of other rights. For example, under this rational an "immunity statute" could be passed which directs magistrates to issue search warrants not based on probable cause, provided that the evidence seized and the fruits thereof are inadmissible in a criminal prosecution.

these courts have concluded that the remedy may be lawfully substituted for the right. The effect of this is to give the privilege against self-incrimination a force of law no greater than a rule of evidence.

We urge that the importance of the constitutional question presented justifies the granting of certiorari to review the judgment of the court below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.[8]

Respectfully submitted,

CHARLES S. MULLEN
THOMAS W. TOP
FREDERICK O. FREDERICKSON
Counsel for Petitioner

July, 1971

8. In its petition for a writ of certiorari in *Korman*, the United States requested that action on the petition be delayed until after a decision is reached in *Kastigar v. United States*, *supra*. Petition of the United States, p. 4, *In re Korman*, *supra*. Anticipating that the Government will take a similar position with respect to the instant petition we respectfully urge this Court not to grant such a request. We believe this case to be of great constitutional significance and as such should be decided on the basis of the most thorough and comprehensive analysis possible. In this regard we note that the instant petition arose from an antitrust investigation and we believe that viewing the challenged statutes from this perspective may very well provide us with insights and arguments materially different from those of counsel representing witnesses involved with other types of grand jury investigations. *Counselman v. Hitchcock*, *supra*, as well as other leading cases involving immunity statutes arose in a business context. e.g. *Hale v. Henkel*, *supra*, (antitrust) and *Brown v. Walker*, *supra*. To insure that all viewpoints and arguments are fully and completely presented, we respectfully urge this court to adopt a policy allowing all petitioners to submit briefs and to grant certiorari with respect to the present petition.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 71-1808

IN THE MATTER OF CHARLES E. BOWDEN,
WITNESS BEFORE GRAND JURY OF THE
WESTERN DISTRICT OF WASHINGTON

Appeal from the United States District Court for the Western District of Washington.

June 24, 1971

Before KOELSCH, HUFSTEDLER and WRIGHT, Circuit Judges *per curiam.*

The order of the district court adjudging Charles E. Bowden guilty of civil contempt and directing his confinement, pursuant to 28 U.S.C. §1826, is affirmed. *Stewart v. United States,* ..... F.2d ..... (9th Cir., May 18, 1971); *Charleston v. United States,* ..... F.2d ..... (9th Cir., June 16, 1971).

A petition for rehearing will not be entertained. Issuance of a mandate is stayed for thirty days to enable appellant to apply for a writ of certiorari. If timely application for such writ is filed, the stay shall remain in effect until the application is denied or, if granted, pending determination of the cause by the Supreme Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN RE GRAND JURY PROCEEDINGS IN THE MATTER OF CHARLES E. BOWDEN

Judgment of Contempt, April 27, 1971

The witness, Charles E. Bowden, having been served with a grand jury subpoena *ad testificandum* issued by this Court, appeared before a federal grand jury sitting in this district on January 13, 1971 and was duly sworn. In response to a series of questions said witness refused to answer, claiming his Fifth Amendment privilege against self-incrimination. On April 27, 1971 said witness was served with a written order of this Court granting him immunity pursuant to the provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §6001 *et seq.* (Public Law 91-452), and he again refused to testify before said grand jury on said grounds. Thereafter, on April 27, 1971 said witness, accompanied by his counsel, appeared before this Court and was thereupon ordered to testify, at which time said witness in the presence of this Court refused to comply with this Court's oral order to testify.

NOW, THEREFORE, IT IS ORDERED:

1. That, pursuant to the provisions of Title III of the Organized Crime Control Act, the witness is adjudged in civil contempt of this Court committed in the presence of this Court, and that he shall be confined at a place to be determined by the Attorney General or his authorized representative until such time as he is willing to testify before said grand jury, but not to exceed the life of the term of said grand jury;

2. Execution of this order is to be stayed upon appeal of this order until 60 days after the mandate is returned to this Court; and

3. Execution of this order is to be permanently suspended should the witness purge himself by rendering his testimony before the said grand jury at any time prior to the expiration of the 60 day period after return of the mandate.

/s/ GEORGE H. BOLDT
United States District Judge

Dated: April 27, 1971

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN RE GRAND JURY PROCEEDINGS IN THE MATTER OF CHARLES E. BOWDEN

Order

Upon the application of the United States Attorney for the Western District of Washington for an order to require testimony of a witness before the grand jury pursuant to Public Law 91-452 (entitled "The Organized Crime Control Act of 1970"); and it being represented by the Government that Assistant Attorney General of the United States Richard W. McLaren has approved this application, it being his judgment that the testimony from CHARLES E. BOWDEN may be necessary to the public interest; and it appearing to the Court that CHARLES E. BOWDEN in the course of grand jury proceedings in the Western District of Washington, has refused, under oath, to answer certain questions propounded to or give testimony on the basis of Fifth and Sixth Amendments to the Constitution of the United States.

THEREFORE, IT IS HEREBY ORDERED THAT: In accordance with the Organized Crime Control Act of 1970, 18 U.S.C. §6001 *et seq.* (Public Law 91-452), CHARLES E. BOWDEN give testimony or provide other information before the grand jury, that any testimony given by CHARLES E. BOWDEN pursuant to this order shall be subject to the immunity provision of the Organized Crime Control Act of 1970 as provided in 18 U.S.C. §6002.

DATED this 27the day of April 1971.

/s/ GEORGE H. BOLDT
United States District Judge

SUPREME COURT, U. S.

No. 71-114

FILED
AUG 23 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES E. BOWDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-114

CHARLES E. BOWDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On January 8, 1971, petitioner was served with a grand jury subpoena *ad testificandum* issued by the United States District Court for the Western District of Washington, directing him to appear on January 12, 1971, before a federal grand jury sitting in Seattle, Washington. A motion to quash the subpoena was denied; petitioner then appeared before the grand jury but refused to answer a number of questions, asserting his privilege against self-incrimination under the Fifth Amendment.

Thereafter, on April 27, 1971, the district court entered an order (Pet. App. C), pursuant to Section 201(a) of the Organized Crime Control Act of 1970, 84 Stat. 927, 18 U.S.C. 6002, granting petitioner immunity and directing him to testify before the grand jury. Petitioner again refused to testify on Fifth Amendment grounds. Later that same day, petitioner appeared before the district court, was ordered once more to testify and refused, and was then adjudged in civil contempt. Execution of the court's judgment was stayed, upon appeal to the court of appeals, until sixty days after the return of the court of appeals' mandate.

On June 24, 1971, the court of appeals affirmed *per curiam* (Pet. App. A), relying on its previous decisions in *Charleston* v. *United States*, C.A. 9, No. 71-1787, decided June 16, 1971, and *Stewart* v. *United States*, 440 F. 2d 954, which upheld the constitutional validity of Section 201(a). The court of appeals' mandate was stayed pending the filing of a petition for a writ of certiorari, and this Court's disposition of that petition.[1]

The issue whether use immunity, as afforded by Section 201(a), is sufficient to meet the requirements

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[1] On August 6, 1971, the government moved in the district court for an order vacating the judgment of contempt, stating that no useful purpose would now be accomplished by petitioner's further appearance before the grand jury. Petitioner refused to consent to the district court's vacating of its contempt judgment, however, and the government's motion was denied. Since the contempt judgment is still outstanding, the fact that the government no longer intends to call petitioner may not be sufficient to moot the case.

of the Fifth Amendment's privilege against self-incrimination is presently pending before this Court in *Kastigar* v. *United States*, No. 70-117, certiorari granted, May 17, 1971. Although the instant case arises in the context of a grand jury investigation into alleged violations of antitrust laws, the question presented is essentially the same as the question in *Kastigar;* the Court's decision in that case will thus control here.

It is therefore respectfully submitted that disposition of the present petition should be postponed until this Court has decided *Kastigar*, if, under the circumstances, the case is not felt to be moot.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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REPLY BRIEF OF PETITIONER

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Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 55 L.Ed. 310, 31 S. Ct. Rep. 279	5
United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897)	6
United States v. W. T. Grant, 345 U.S. 629 (1953)	6
Walling v. Helmerich & Payne, 323 U.S. 37 (1944)	6

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

CHARLES E. BOWDEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

ARGUMENT IN REPLY

The United States in reply to the petition for certiorari suggests that this case may be moot. Brief of the Respondent, p. 2 n.1. We respectfully urge that certain events discussed below which took place subsequent to the docketing of the Petition have not rendered this case moot.

On July 22, 1971, the Department of Justice submitted to counsel for petitioner a document captioned "APPLICATION AND ORDER VACATING JUDGMENT OF CONTEMPT AGAINST CHARLES E. BOWDEN." The Government in its "application" stated it had concluded that "no useful purpose will now be

accomplished by Mr. Bowden's further appearance before said Grand Jury" and requested that the contempt citation be vacated. On August 6, 1971, a hearing was held in the United States District Court for the Western District of Washington and the court per the Honorable George W. Boldt, Chief Judge, denied the Government's motion.[1]

The motion submitted to the District Court offered no guarantees that the petitioner would not be called at some future time during the pending investigation. The Government has made no assertion that it has completed the basic investigation which gave rise to the subpoena issued to this petitioner. The Grand Jury before which the petitioner appeared is still in session and in this regard we note that this is the second Grand Jury to investigate antitrust matters which gave rise to the subpoena received by the petitioner. Should the instant petition be dismissed as moot, the Government could immediately change its mind and resubpoena petitioner causing him once again to commence climbing the long path leading to this Court.

The decision that the petitioner's testimony was not needed was apparently reached during the 28-day period between June 24, 1971 and July 22, 1971.[2] The Government asserted that the decision was "reached as a result of [a] review of documents submitted to the Grand Jury and an analysis of all testimony pursuant to this investigation." App. A. It is within the knowledge of petitioner's counsel

1. A copy of the "Application and Order" is set forth in Appendix A. The document contains a handwritten notation by the court refusing to enter the Order. The petitioner filed a brief with the District Court in which it was asserted that the court did not have jurisdiction to hear the Government's motion.

2. The Government in its motion stated that this decision was reached subsequent to the ruling on June 24, 1971 by the Court of Appeals. As previously noted counsel for petitioner was first informed of the government's decision 28 days later on July 22, 1971. Coincidently the petition for a writ of certiorari was docketed with this Court on July 22, 1971.

that some of the evidence produced in this investigation has been in the Government's possession for a period well in excess of one year. Thus the decision not to call the petitioner as a witness has some distinctly capricious aspects. We urge that under these circumstances it would be manifestly unfair to dismiss this case as moot leaving the petitioner with no guarantee that he will not receive a second subpoena to testify in the investigation which gave rise to the first subpoena.

This case should not be held to be moot as a matter of law. Applicable decisions of this Court have held that so long as the underlying controversy remains alive, a case will not be found moot even though technical matters may provide a superficial basis for such a finding. In view of the Government's failure to provide assurances that this witness will not be called in the investigation which gave rise to his subpoena and in view of its failure to give any indication that this investigation has been completed, a very real possibility exists that petitioner will again be called to testify. Therefore, it must be concluded that the underlying controversy which gave rise to this case still exists.

With respect to mootness, we believe the present case closely parallels the decision in *McGrain v. Daugherty*, 273 U.S. 135 (1927). In *McGrain* the United States Senate, as a result of accusations that a former Attorney General was guilty of corruption, empowered a select committee to investigate the circumstances and facts of the alleged corruption. This committee on two occasions subpoenaed M. S. Daugherty, brother of the former Attorney General under investigation. The witness was personally served with subpoenas but on each occasion refused to appear.

The committee referred this matter back to the full Senate which passed a resolution directing the sergeant-at-

arms to take Daugherty into custody and bring him before the Senate to answer questions pertinent to the inquiry. A deputy sergeant-at-arms took the witness into custody for the purpose of bringing him before the Senate as commanded. The witness petitioned a federal court for a writ of habeas corpus.

The investigation was ordered and the select committee was appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. This Court at the time of its decision in 1927 noted that it must resolve the issue whether the case became moot at the termination of the Sixty-eighth Congress. This Court found that "the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order." *Id.* at 181. It was noted that the activities of the committee apparently had been suspended, pending a decision in the case. Under these circumstances, this Court held that the case was not moot, stating in part:

> "[T]he committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 514-516, 55 L. ed. 310, 315, 316, 31 Sup. Ct. Rep. 279, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings. In these circumstances we think a

judgment should be rendered as was done in the case cited." *Id.* at 181-182 (footnote omitted)[3]

In *McGrain* this Court commented that the judgment "may yet be carried into effect" thus recognizing by a negative implication that the decision might never have any substantive effect. The opinion also noted that a Congressional motion may be necessary to empower the Committee to take further action. Nonetheless, the case was decided on the merits because the order was "capable of repetition" and "a matter of public interest" was involved. These criteria are applicable to the instant proceeding. The petitioner may receive a second subpoena during the course of the Government's ongoing antitrust investigation and the question of whether the immunity provisions of the Organized Crime Control Act are constitutional is a matter of a great public interest.

Our position with respect to mootness is supported by *Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963). That case arose when employees of a transit system elected to go on strike. The Governor of Missouri acting under the authority of a state law known as the King-Thompson Act[4] issued an executive order taking over the property of the transit company. The state then sought an injunction pur-

3. In *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 55 L.Ed. 310, 31 S. Ct. Rep. 279, the basic issue involved the validity of a "cease and desist" order issued by the Interstate Commerce Commission. The Order was of a two-year duration and had expired prior to the time this court reached its decision. Noting that the issue of mootness must be resolved because the underlying order had expired, this Court found that judicial redress must be available for short term orders which are capable of repetition recognizing that a contrary result would undermine the judicial process. This Court observed "[the fact that] the government is the respondent not complainant, does not lessen or change the character of the interest involved in the controversy, or terminate its questions." *Id.* at 516. Thus, in the instant case the fact that the Government is the Respondent should also be of no import.

4. See *Motorcoach Employees v. Missouri* at 376 n.1.

suant to a provision of the Act which made it unlawful to strike against a utility after possession has been taken by the state. The constitutionality of this action was challenged on a number of grounds.

After the Appellant's jurisdictional statement was filed, the Governor of Missouri issued an executive order which although reciting that the labor dispute remained unsolved terminated the outstanding seizure order. It was thus contended that the case had become moot. The Court held that the case was not moot and distinguished two cases[5] cited in support of the mootness contention, as follows:

> "In both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here by contrast the labor dispute remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act." *Id.* at 377-378.

The *Motorcoach Employees* case is further recognition of the proposition that a case is not moot so long as the underlying controversy remains in existence. There are many other decisions which support the basic position we have taken with respect to mootness, e.g. *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175 (1968); *United States* v. *W. T. Grant*, 345 U.S. 629 (1953); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257 (1938); *United States* v. *Trans-Missouri Freight Assoc.*, 166 U.S. 290 (1897).

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5. The cases distinguished by this Court were: *Oil, Chemical & Atomic Workers Intl. Union* v. *Missouri*, 361 U.S. 363 (1960) and *Harris* v. *Battle*, 348 U.S. 803 (1954).

The Government contends that this case will be governed by *Kastigar* v. *United States*, No. 70-117 certiorari granted, May 17, 1971 and thus suggests that disposition of this petition be postponed until *Kastigar* is decided. We respectfully urge that this Court reject the Government's suggestion.

In resolving the issue presented by these cases, this Court must decide whether the principles enunciated in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), will have continuing effect. Unlike *Kastigar*, *Counselman* and the present case both arose in a business context. We believe that it may facilitate this Court's evaluation of *Counselman* to have before it a case which arose in circumstances similar to those in that decision. The instant case might bring into focus various problems relative to the conduct of businesses which may have motivated the Court in reaching the decision in *Counselman*. In addition, we submit that the basic issue presented is of great constitutional significance and therefore the Government's suggestion might serve to deprive this Court of legal viewpoints which could be of assistance in the resolution of this important issue.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

CHARLES S. MULLEN
THOMAS W. TOP
FREDERICK O. FREDERICKSON
Counsel for Petitioner

Dated: September 10, 1971

APPENDIX A

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AUG - 6 1971

CHARLES A. SCHAAF, CLERK
By _____ Deputy

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

IN RE GRAND JURY PROCEEDINGS
In the Matter of Charles E. Bowden

APPLICATION AND ORDER VACATING JUDGMENT OF CONTEMPT AGAINST CHARLES E. BOWDEN

Charles E. Bowden, a grand jury witness, was adjudged to be in civil contempt of this Court on April 27, 1971 for refusing to testify before the grand jury pursuant to a subpoena ad testificandum issued by this Court granting him immunity under the provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §6001 et seq. (Public Law 91-452). Said Judgment of Contempt provided that the witness was to be confined at a place to be determined by the Attorney General or his authorized representative until such time as he was willing to testify before said grand jury, but not to exceed the life of the term of said grand jury. Execution of the order was stayed upon appeal of the order until 60 days after the Court of Appeals mandate is returned to this Court.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST: CHARLES A. SCHAAF
Clerk, U. S. District Court
Western District of Washington
By _____ Deputy Clerk

Subsequently an appeal was taken to the Court of Appeals and the Judgment of Contempt was affirmed on June 24, 1971. Issuance of a mandate was stayed, however, for thirty days to enable appellant to apply to the Supreme Court for a writ of certiorari.

Since the order of the Court of Appeals was issued, counsel for the Government have determined that no useful purpose will now be accomplished by Mr. Bowden's further appearance before said grand jury. This decision has been reached as a result of review of documents submitted to the grand jury and an analysis of oral testimony received pursuant to this investigation. The Government therefore applies to this Court for an order vacating and dismissing the Judgment of Contempt against Charles E. Bowden.

Presented by:

James E. Figenshaw

James E. Figenshaw
Attorney, Department of Justice

THE COURT, having considered the above matter, HEREBY ORDERS THAT the Judgment of Contempt against Charles E. Bowden is vacated.

Dated this _____ day of August 1971.

UNITED STATES DISTRICT JUDGE

Approved as to Form; Notice of Presentation Waived:

Refused 8/6/71

Charles S. Mullen of
Graham, McCord, Dunn, Moen,
Johnston & Rosenquist
Attorney for the Witness